Who Bears the Cost?

Charles Siemon

Many municipalities in the United States, especially in rapidly growing areas, are considering or have adopted impact fee systems to help pay for the costs of new growth. Although such systems are a logical response to development pressures and the need for providing capital facilities, they may violate well-established planning law traditions. This timely article explores whether impact fee programs conflict with principles of planning and the due process of law, both of which have been integral to the development of modern planning law.

Introduction

> Raising expansion capital by setting connection charges not exceeding a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money raised is limited to meeting the costs of expansion.* Users "who benefit especially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension."[1]

The concept of development exactions[2] for off-site capital facilities, that is, that new growth and development should pay a fair share of the cost of facilities needed to serve that growth has, in just a few years, evolved from an abstract theory[3] into a full-blown land use "fad."[4] In Florida, for example, where land use "fads" find fertile ground,[5] local authorities have been in a virtual fever to enact and enforce ordinances imposing impact fees for roads, parks, potable water, libraries, sanitary sewers, solid waste, police, fire, and emergency services.[6] More than forty local governments have enacted similar ordinances during the last two years.[7] In such diverse areas as San Francisco, Boston, and Aspen, developers pay a fee or provide for affordable housing.[8] Exactions are, in fact, a logical and reasonable response to the cost of sprawl.[9] Exactions are not, however, free of drawbacks. Their seductive attractiveness in terms of efficiency and expediency should not be allowed to overshadow what may be very serious conflicts with well-established planning law traditions. This article briefly discusses two aspects of those traditions and suggests several ways in which they conflict with exactions.

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Contemporary land use law, albeit subject to much criticism,[10] is a reasonably balanced product of careful and effective evolution.[11] The rigidity of Euclidean districts has given way to process-secure flexible zoning districts. Generally, a fair balance has been established between public needs and private expectations.[12] The evolution of land use controls and the establishment of a reasonable balance between public and private interests is the result of two important influences – planning[13] and due process of law.[14] Because exactions may conflict with the principles of planning and may run counter to well-established principles of due process, a genuine basis for concern exists.

Planning

"If American land use controls are to work effectively and fairly, they must be based upon (a) an overall understanding of the needs for land in the community, and (b) a sense of direction – that is to say, upon *planning*".[15] Simply put, the reasonableness of land use controls depends upon planning for coherence, comprehensiveness, and consistency.[16] Otherwise, land use controls are nothing more than ad hoc exercises of public authority over private rights in a chaotic and often abusive process.

Unfortunately, planning, although influential in the evolution of contemporary land use controls, has not lived up to its theoretical promise. Indeed, many observers conclude that planning has been anything but successful.[17] Nevertheless, the overriding logic of planning as a basis for land use controls has been a powerful influence in the evolution of land use controls. In fact, Professor Haar's insightful article, *In Accordance with a Comprehensive Plan*,[18] served as a powerful force in molding the efforts of contemporary reformers like Babcock[19] and Sullivan,[20] despite the failure of the American Law Institute's Model

Land Development Code to mandate planning as a prerequisite for zoning.[21] Haar said:

> It is difficult to see why zoning should not be required, legislatively and judicially, to justify itself by consonance with a master plan as well. It might even be argued that any zoning done before a formal master plan has been considered and promulgated is per se unreasonable, because of failure to consider as a whole the complex relationships between the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare.[22]

Although no one would claim that a clear judicial mandate for planning has been established, even a brief review of the Supreme Court's recent forays into the land use arena illustrates that planning is now a well-accepted element of a valid system of land use controls. In *Penn Central Transportation Co. v. City of New York*,[23] the Court rejected an attack on New York City's landmark preservation law in part because "[i]n contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a *comprehensive plan* to preserve structures of historic or aesthetic interest. . . ."[24]

Similarly, in *Young v. American Mini Theatres, Inc*,[25] Justice Stevens noted that "the city's interest in *planning* and regulating the use of property"[26] is a substantial public interest. More importantly, in *Metromedia, Inc v. City of San Diego*,[27] Justice Brennan, a central figure in the Court's decisions regarding zoning law,[28] criticized San Diego's sign regulations because:

> [B]efore deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment. . . .Of course, this is not to say that the city must address all aesthetic problems at the same time, or none at all. Indeed, from a *planning point of view*, attacking the problem incrementally and sequentially may represent the most sensible solution. On the other hand, if billboards alone are banned and no further steps are contemplated or likely, the commitment of the city to improving its physical environment is placed in doubt. By showing a *comprehensive commitment* to making its physical environment in commercial and industrial areas more attractive, and by allowing only narrowly tailored exceptions, if any, San Diego could demonstrate that its interest in creating an aesthetically pleasing environment is genuine and substantial.[29]

Due Process of Law

The other fundamental influence on contemporary planning law with which exactions may well conflict is due process of law—a group of rights derived from the fifth and fourteenth amendments of the Constitution.[30]

Reduced to simple terms, due process of law is a limitation on the manner in which government exercises power over individual rights and interests. As Justice Fortas once noted: "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[31]

Notwithstanding the accepted fundamental nature of due process, the precise meaning of the concept is undefined and has been the subject of "[m]any controversies."[32] " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual context. . . [A]s a generalization, it can be said that due process embodies differing rules of fair play, which through the years, have become associated with differing types of proceedings."[33]

Due process requires that governmental powers affecting private rights and interests be exercised in a *fundamentally fair* fashion. " 'Due process' emphasizes fairness between the State and the individual dealing with the State. . . ."[34]

Paying for amenities.

This concept of fundamental fairness has shaped modern land use controls both substantively[35] and procedurally. The substantive nature of due process of law in relation to restrictions on land use was discussed by the Supreme Court in *Nectow v. City of Cambridge*.[36] The Court stated:

> [T]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare.[37]

This standard has, for fifty years, provided the substantive contours of land use controls. These contours have developed coincident with the clearly understood idea that the public welfare is not limited to protection from *offensive and noxious* activities and, therefore, the police power itself is broad enough to respond to the needs of a developing nation.[38]

Substantive due process is alive and well in the planning law context and provides clear jurisprudential support for Haar's planning thesis.[39] Haar believes that land use regulations should be enacted pursuant to a comprehensive plan because such regulations will bear a substantial relationship to the public health.[40] In other words, comprehensive planning ensures existence of a substantial relationship between the particular character, location or intensity of a land use and the public health, safety, and welfare.

The policy behind the due process clause is protection of rights through procedures that are fair. What is fair depends upon a host of factors, particularly the private rights involved. "Experience teaches. . . that the affording of procedural safeguards, which by their nature serve to *illuminate the underlying facts*, in itself often operates to prevent erroneous decisions on the merits from occurring."[41]

Notice to an individual of an impending decision that affects him, the information upon which the decision is to be made, and the opportunity to present opposing information and argument are examples of the kind of safeguards that ensure fundamental fairness. "The assumption is that by giving parties with sufficient interest in the outcome a chance to present evidence from their point of view, the government can best make an informed decision which considers all relevant factors."[42]

As the above illustrates, fundamental fairness encompasses a number of concepts. The first of these concepts is the notion that governmental decisions should be made on the basis of merit, not on the basis of personalities or self-interest: "The public has the right to expect its officers. . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse."[43] There must also be an adequate opportunity for affected persons to find out what information will be used in the decision-making process and to offer information or argument in rebuttal.

The mere existence of procedural safeguards is not enough to satisfy the requirements of due process. "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[44] A meaningful opportunity to be heard also requires a realistic opportunity to participate, free of practical constraints that prevent actual participation.[45]

Due process also contemplates equal access and treatment. It "is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government."[46] This concept includes access to processes without regard to economic station. As Justice Black stated in *Griffin v. Illinois*, "[s]urely no one would contend that either a state or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court."[47] In addition, he noted that "there can be no equal justice where the kind of a trial a man gets depends upon the amount of money he has."[48]

Another doctrine that is rooted in the due process clause is the doctrine of vagueness—the constitutional requirement that a government proscription be explicit enough that affected persons are on notice of those acts or omissions that will expose them to liability.[49] In the absence of defined standards that are uniformly applied there can be no equal treatment except by mere coincidence. Governmental power must be confined to the principles of due process if the salutory goals of the constitutional draftsmen are to be achieved.

The difficulty with exactions is that they are antithetical to the planning and due process principles stated above in a number of ways. They are inherently inconsistent with the established tenets that have defined planning and due process in the past.

First, exactions conflict with planning and due process principles because the idea of a fair share "pay as you go" exaction system creates the illusion that the character, location, and magnitude of land use is simply a matter of a developer's willingness to pay for the cost of new services required by new growth. Indeed, developers are often vocal supporters of reasonable exactions because they see them as a means of overcoming local concern about growth. Given that most growth management controls have been predicated on the capacity of available public

facilities,[50] the developers' perspective is understandable. The trouble is that the appropriateness of a particular land use at a particular location depends on far more than the developer's willingness to pay for needed infrastructure.

The intangible values, community character and quality of life, which lie at the heart of Justice Douglas' now often-repeated ode to community character in *Village of Belle Terre v. Boraas*,[51] are vulnerable to incompatible or undesirable land uses whether or not a developer is willing to pay for water, sewer, or roads. In other words, quality of life involves far more than fiscal efficiency. It is imperative that land use controls be capable of conserving community values even if a developer is willing to pay for the cost of needed improvements. Of course, imposition of an exaction system does not mandate abandonment of planning programs directed toward maintaining the community character and quality of life. Nevertheless, some legislators appear to accept that adoption of an exaction scheme results in abandonment of this type of program. For example, the Florida Legislature[52] has taken the view that change is inevitable and that the focus must be on how to accommodate that change. This position has upset dozens of local authorities that have comprehensive plans designed to protect important community values even though greater densities, higher buildings, or more coverage could be accommodated financially.

The antiplanning implications of exactions go beyond the political impacts just described. The reason is that quality of life and community character are concepts that are difficult to quantify and therefore difficult to reduce to simple regulatory equations, particularly in communities that are not large enough to support a sophisticated planning department. The inevitable temptation is simply to abandon the intangibles and to devote available energies to capital facilities planning—a *re*active rather than a *pro*active approach to the future.

As troubling as the antiplanning aspect of exactions are, the whole idea that permission to develop should be dependent on one's willingness to *pay* raises an even more odious implication that was rejected long ago as inappropriate—that zoning is or should be for sale. Most exaction ordinances contain a schedule of payments purportedly linked to the community needs occasioned by new growth and development. Most ordinances, however, also provide for an alternative fee calculation that responds to the imprecision of impact assessments. As will be shown below, this type of provision is unfortunate because the calculation is arrived at through negotiation, another contemporary land use "fad."

In plain terms, under this type of provision, the developer bargains for his zoning. He may agree to give the community a new road, ambulance, or whatever, if permitted to build at a higher density. Such a process ignores the merits of a particular land use at a particular location and focuses instead on the payment to be received. In other words, a six-lane road may solve the traffic needs of new growth and development, but it does so at a cost. Growth for its own sake cannot justify transforming neighborhoods, wetlands, parks, and waterfronts into freeways. Worst of all, the deal made usually depends on who the deal maker is, rather than what is proposed. This negotiatory process, which is increasingly being used to arrive at decisions relating to land use,[53] exacerbates the risk inherent in exactions. The reason is that negotiations are uncomprehensive and not standard- or process-oriented; they rely not on well-conceived policies but on ad hoc agreements that are usually private. The finely tuned tension between public and private interest, tempered by citizen involvement and participation, threatens to be replaced by negotiated deals, the fairness of which depends on the integrity of individuals in office at any given time.

After years of faithful adherence to the principles of fundamental fairness, it is difficult to understand why this nation would suddenly find salvation in an idea that has the potential for abuse and disparate treatment. Of course, the obvious solution is to eliminate the alternative fee calculation process from exaction ordinances, which would eliminate the possibility of abuse and manipulation. The trouble is that the so-called science of exactions is so imperfect that (understandably) few authorities feel comfortable relying exclusively upon a rigid preset schedule, which represents a strong condemnation of the entire concept of exactions. In the abstract, these concerns are manageable. The limited scrutiny applied to local regulations by courts, however, makes it difficult to believe that the abuses described will not flourish and heighten concern about the concept of exactions.

Once it is accepted that it is appropriate for a landowner to pay an exaction in order to exercise his constitutional property rights, judicial review of exaction standards is limited to a "fairly debatable" standard[54]—what Judge Goldberg of the Court of Appeals for the Fifth Circuit fondly refers to as the "anything goes" test.[55] Simply stated, a regulatory standard has to be outlandish before a court will intervene, a notion that has assuredly been confirmed by the Supreme Court's modern polestar of local economic regulations, *New Orleans v. Dukes*.[56]

Dukes was in fact an equal protection case, but the scope of judicial scrutiny implicit in the fairly debatable standard and the rational basis standard are virtually identical. The city of New Orleans had passed an ordinance prohibiting street vendors in the Vieux Carre. The city, solicitous of the interests of existing vendors (one vendor

Impact fees—where does the road lead?

in particular, reportedly a politically influential individual), exempted those vendors who had been active in street vending for more than six years.[57] A hot dog vendor with less than six years in the streets brought suit challenging the ordinance. The Fifth Circuit invalidated the ordinance on the ground that it was ludicrous to suggest that six years of experience selling hot dogs was distinguishable from five years on the job. The United States Supreme Court reversed, holding that judicial scrutiny of esentially economic regulations is limited, and that courts should not second-guess the judgment of elected officials:

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step. . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . . In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.[58]

The theory adopted in *Dukes* is an appalling invitation for abuse by local governments in the context of exactions. Because the judiciary is unwilling to interfere with economic regulations, municipalities are confident that developers will find it easier and cheaper to accept exaction fees rather than challenge the regulations in court.

An example, anonymous because the developer's travails continue, illustrates the potentially coercive character of the exaction process. The developer proposed to develop a parcel located at a boundary of a municipality. The municipality maintains a municipal sewage system that collects and transmits sewage to a regional wastewater treatment facility operated by the county. Pursuant to a sewer service agreement, the municipality collects for the county an impact fee for the fair share of treatment facility capacity used by each unit of development. Unfortunately for the developer, the municipality's collection system does not reach his property. He is therefore obligated to build a sanitary sewer that connects to another part of the county's system in an adjacent municipality. Worse still, because of a downstream infiltration problem, the developer is obligated to contribute an additional $250,000 to the repair of the downstream system. When he applied for a building permit, he was required to pay an impact fee that was three and a half times the amount due the county under the sewer service agreement, even though he had already constructed the sewer main and contributed $250,000 to support downstream remedial efforts.

The municipality's position is simple: it does not matter whether the fee is fair—no fee, no building permit. Given that litigation will cost thousands of dollars and last between nine months and one year (if the municipality does not appeal), the developer has no choice but to pay the fee. Worst of all, to some, the municipality's position may seem plausible because the cost levied against the developer is in fact a pro rata share of the cost of the village's system. This view, however, overlooks the simple fact that the developer does not actually use the village's system and is saddled with the fee only because his property is located within the village.

In other words, the impotency of judicial review exaggerates the potential for abuse outlined above, and explains why it is necessary to adhere strictly to the principles of fundamental fairness. The abuses inherent in exactions are inevitable and, in the face of years of experience directed to the fairness of the planning process, unacceptable.

Regretfully, the antiplanning and due process difficulties do not exhaust the potential problems with exactions. Implicit in the concept of paying for the right to develop is the reality that only those who can afford to pay are permitted to develop—a circumstance that offers a community a clever, but shameful, means of excluding those of an undesirable character. In fact, in my opinion, this insidious by-product of exactions earns it the label as the latest sheepskin for the wolf of exclusionary zoning.

The impact of public regulation on the cost of housing has been the subject of extensive treatment and it takes no significant imagination to appreciate that a carefully established exaction scheme can keep out undesirables. Indeed, an impact fee of $5,000 to $10,000 has a significant impact on the affordability of housing and could ensure that only those of substantial means locate in a community—all for the seemingly legitimate purpose of imposing a fair share of the costs on all new development, costs

Growth in downtown Chicago.

that are easily manipulated by elected officials through judicious planning. Consider a community, for example, that imposes a regulatory impact fee for a wide range of facilities, including many desirable but unnecessary facilities such as a cultural center or expansive recreation facilities. The pro rata share of such facilities is $15,000, a fee that is *de minimis* to the wealthy, but discriminatory against the less fortunate, not by classification but by effect.

One final aspect of exactions merits brief mention. The Constitution clearly proscribes the taking of private property for public use without payment of just compensation,[59] yet exactions amount to such a taking. Although courts have traditionally validated exaction systems, it is difficult to understand how a regulation that requires dedication of land or payment of a fee in lieu thereof does not violate the taking clause. Under an exaction scheme, private property, land or money, is taken for public use without just compensation. This paradox goes curiously unresolved.

Conclusion

Exactions are a viable means of ensuring that adequate facilities are available to serve new growth and development. It is imperative, however, that the draftsmen and public officials who develop such programs clearly understand that there are great risks inherent in any exaction system and that careful preparation is necessary to ensure that the system achieves true equity. □

Charles Siemon is a partner in the law firm Siemon, Larsen, Mattlin & Purdy, based in Chicago. The firm specializes in planning law.

1. Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320 (Fla. 1976) (footnote omitted), *reconsidered on appeal from unpublished remand*, 358 So. 2d 846 (Fla. Dist. Ct. App. 1978) (amended exaction held legal), *cert. denied*, 370 So. 2d 458, *cert. denied*, 444 U.S. 867 (1979).

2. "Development exactions" is a generic term used in this article to describe an assortment of techniques employed by local authorities to compel a developer, either by regulation, negotiation, or simple leverage, to exchange land, money, materials, or services for permission to develop.

3. *See, e.g.*, American Soc'y of Planning Officials, Local Capital Improvements and Development Management 57-59 (1977).

4. In rough order of their appearance, other notable land use "fads" include planned unit development, transferable development rights, land use controls, and performance zoning.

5. *See generally* Fla. Stat. Ann. ch. 380 (West 1974 & Supp. 1986). For a discussion of Florida's attempts to guide local decisions relating to growth and development, see Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 6 Urb. L. Ann. 103 (1973).

6. *E.g.*, Home Builders and Contractors Ass'n v. Palm Beach County, 446 So. 2d 140, 141 (Fla. Ct. App. 1984) (discussing Palm Beach County's enactment of a comprehensive plan in response to its "unsual growth rate"); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 612 (Fla. Ct. App. 1983) (discussing Broward County ordinance enacted to meet needs raised by new subdivision growth).

7. I have been involved in numerous impact fee programs either as a consultant or as counsel for a private sector interest and have compiled a substantial library of impact fee ordinances from around the country including ordinances from, for example, Lincolnshire, Illinois; Palm Beach County, Florida; Broward County, Florida; Sarasota County, Florida; and San Diego, California.

8. *See, e.g.*, Porter, *The Local Regulatory Scene: Overview and Outlook*, in Development Review and Outlook, 1984-1985, at 403 (1985).

9. For a discussion of the costs of sprawl, see Council on Envtl. Quality, The Costs of Sprawl (1974).

10. *See, e.g.*, R. Nelson, Zoning and Property Rights (1977); Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Ziegler, *The Twilight of Single-Family Zoning*, 3 UCLA J. Envtl. L. Pol'y 161 (1982).

11. Much of the criticism leveled at zoning ignores the many practical and effective reforms accomplished by local authorities throughout the country. Indeed, it has been suggested by Ed Sullivan, dean of Oregon's planning lawyers, that the critics are out of touch with the current state of planning law. He believes that many of the concerns rehashed by the critics were long ago solved with clearly written, flexible ordinances that emphasize specific standards and define development review procedures. Personal conversation with Ed Sullivan, Partner, Sullivan, Josselson, Roberts, Johnson & Kloos (Oct. 26, 1985).

12. There are, of course, jurisdictions where the balance is tipped in favor of the public interest. The mainstream of American planning law, however, is far more reasonable than the critics of the excesses in California would have the world believe. *See generally*, Porter, *On Bemoaning Zoning*, Urb. Land, March 1983, at 34.

13. "Planning," as used in this article, describes a discipline in which a decision maker compiles information relative to his responsibilities, assesses the information, and then establishes abstract policies to be applied to individual decisions. As used in this article, planning represents the antithesis of ad hoc decision making.

14. "Due process of law" refers generally to a range of substantive and procedural principles that have evolved through the two due process clauses of the Constitution. U.S. Const. amend. V, XIV, § 1.

15. 1 N. Williams, American Planning Law § 1.01, at 2 (1974) (emphasis added). Williams goes on to observe that, "[u]nder a rational system of public action, the basic policy decisions should be made first on a coordinated basis (planning); and then the appropriate tools (including the various land use controls) should be selected to carry out these decisions." *Id.* at 3.

16. *See generally* F. Bosselman, D. Feurer & C. Siemon, The Permit Explosion, Coordination of the Proliferation (1976).

17. *See, e.g.*, Siemon & Larsen, *In Accordance with the Comprehensive Plan – the Myth Revisited*, 1979 Inst. on Plan., Zoning & Eminent Domain 105. Alan Jacobs has decried the failure of planning to mature as a profession and suggested that the profession of planning be abolished and that we start anew to establish the "profession of Olmstead." Address by Alan Jacobs, Professor of City and Regional Planning, Annual Meeting of the American Planning Association, Florida Chapter (Nov. 6-8, 1985). Jacobs of course, has much to be dissatisfied with, as Babcock and Siemon have observed:

> Planning has been scorned, mocked, disparaged, and disdained since the earliest days of land use regulation. Worse yet, it has been ignored. Oh, there have been millions and millions spent on planning (most of it lavished on local government by various agencies of the federal government), but the officially adopted, actually used planning instrument is a rare beast indeed. It was, for starters, a stepchild of land use regulation, sitting by the hearth while its more robust sisters, zoning and subdivision controls, were cavorting across the American landscape.

R. Babcock & C. Siemon, The Zoning Game Revisited 261 (1985).

18. Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955).

19. One of Babcock's principal works reflecting his philosophy on land use is R. Babcock & C. Siemon, *supra* note 17.

20. Sullivan discusses some of his views on land use planning in Sullivan & Kressel, *Twenty Years After – Renewed Significance of the Comprehensive Plan Requirement*, 9 Urb. L. Ann. 33 (1975).

21. *See* Model Land Dev. Code (1976). Professor Dan Mandelker, another strong advocate of planning, ably recounts the need for planning in his article, Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 899 (1976).

22. Haar, *supra* note 18, at 1174.

23. 438, U.S. 104 (1978).

24. *Id.* at 1323 (emphasis added). The Supreme Court's preference for planning is also evident in Justice Douglas' majority opinion in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In a footnote, Justice Douglas complemented the Court's refusal to limit the concept of the public welfare with a reference to Vermont's land use controls, which, according to Douglas:

> direct local boards to develop plans ordering the uses of local land, *inter alia*, to "create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, [and] reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population . . .

Id. at 5 n.3.

25. 427 U.S. 50 (1976).

26. *Id.* at 62 (emphasis added).

27. 453 U.S. 490 (1981).

28. *See* Williamson County v. Hamilton Bank, 105 S. Ct. 3108 (1985) (Brennan, J., concurring); San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting); Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Servs., 436 U.S. 658 (1978); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

29. 453 U.S. 490, 531-33 (1981) (emphasis added) (footnotes omitted).

30. U.S. Const. Amend. V, XIV, § 1.

Two hundred years ago, the founding fathers established a government of laws and not of men, in order to ensure that personal privilege would not supplant the rule of law. As James Madison said:

> If they [the ten amendments comprising the Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 Annals of Congress 439 (J. Gales ed. 1789).

31. *In re* Gault, 387 U.S. 1, 20 (1967). Justice Harlan has also remarked:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner . . .
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common law model. . . .Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognizes *the centrality of the concept of due process* in the operation of this system.

Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971) (emphasis added).

32. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

33. Hannah v. Larche, 363 U.S. 420, 442 (1960). Note also Justice Johnson's characterization of the due process principle:

> [A]fter volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they [the words of due process] intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 242 (1819).

The due process concept evolved from English common law, and was incorporated in the Bill of Rights. It has continued to find amplification through the fourteenth amendment, legislative enactments (for example, the Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1982)), and judicial interpretation. Unfortunately, or fortunately, depending on one's

perspective on judicial activisim, evolution has not yet produced a precise construction of the due process clause, a circumstance Justice Black has lamented in several dissents.

> The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it [the due process clause] was intended to give this Court unlimited authority to supervise all assertions of state and federal power to see that they comport with our ideas of what are "civilized standards of law...
>
> This perhaps is in keeping with the idea that the Due Process Clause is a blank sheet of paper...

Boddie v. Connecticut, 401 U.S. 371, 393-94 (1971) (Black, J., dissenting) (quoting Williams v. North Carolina, 325 U.S. 226, 271-74 (1945) (Black, J., dissenting).

34. Ross v. Moffitt, 417 U.S. 600, 609 (1974).

35. After the era begun by the Supreme Court's decision in Lochner v. New York, 198 U.S. 45 (1905), the Court retreated from judicial scrutiny of the substance of economic regulations. G. GUNTHER, CONSTITUTIONAL LAW 462-75 (11th ed. 1985). Zoning law, however, has always and steadfastly been defined by a substantive requirement that a regulation must provide a minimum factual basis under the "fairly debatable" standard. For a discussion of this standard, see *infra* text accompanying notes 54-57.

36. 277 U.S. 183 (1928).

37. *Id.* at 188 (1198) (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

38. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

39. Haar, *supra* note 18; *see* text accompanying notes 18-22.

40. There is a second substantive limitation that arises from the due process clause that is not directly implicated by exactions, the so-called "taking" issue. In Williamson County v. Hamilton Bank, 105 S. Ct. 3108 (1985), Justice Blackman rehearsed without endorsing the argument that a regulation that is overly intrusive is a violation of due process. It is apparent, however, that the lengthy discussion, together with Justice Stevens' cogent concurrence, *id.* at 3125 (Stevens, J., concurring), suggests acceptance of this argument, a position that was also taken by Justice Holmes in Block v. Hirsch, 256 U.S. 135, 156 (1921).

41. Silver v. New York Stock Exch., 373 U.S. 341, 366 (1963).

42. Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886 (1975).

43. Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964). Implicit in the requirement that decisions be made on the basis of merit is a requirement that decisions be based on all relevant information. "The hearing required by the Due Process Clause must be 'meaningful'...It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision...does not meet this standard." Bell v. Burson, 402 U.S. 535, 541-42 (1970) (citations omitted).

44. Armstrong v. Manzo, 380 US. 545, 552 (1965) (citations omitted).

45. For example, in Vlandis v. Kline, 412 U.S. 441 (1973), the Court struck an irrebuttable statutory presumption that the residence of a university student would always be the location from where an application was sent "because [the presumption] provides no opportunity for students who applied from out of state to demonstrate that they have become bona fide Connecticut residents." *Id.* at 453.

Similarly, in a case challenging mandatory maternity leave for teachers beginning five months before the anticipated birth of their children, the Supreme Court struck the regulation and repeated its dislike for procedures that do not afford individualized consideration of the underlying facts in each case.

> There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

Cleveland Bd. of Educ. v. Le Fleur, 414 U.S. 632, 644 (1975).

46. Maxwell v. Dow, 176 U.S. 581, 603 (1900). Courts have found due process violations where procedures affect individuals disparately in a number of contexts: "Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

47. 351 U.S. 12, 17 (1956) (footnotes omitted). In another Supreme Court case, indigent persons sought access to the divorce courts of Connecticut, but were denied because their indigency prevented them from being able to pay the filing fees. The Supreme Court struck the provisions and required the state to develop a procedure that did not disparately bar persons from the courts.

> [W]e conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed rights to a dissolution of their marriages, and, in the absence of sufficient countervailing justification for the State's action, a denial of due process.

Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971) (footnotes omitted). The court noted that the state had interposed itself into marital relations and by law had provided that marriages could be dissolved only through judicial process, and, having done so, had to make those procedures equally available to all persons. *Id.*

48. 351 U.S. at 19.

49. See United States v. Harris, 347 U.S. 612, 617 (1954), where the Court stated that "[t]he underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

50. *E.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975); Golden v. Planninag Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 S.2d 138 (1972).

51. 416 U.S. 1, 9 (1974).

52. The Florida legislature, acknowledging that planning must occur along with population growth, passed the Local Government Comprehensive Planning and Land Development Regulation Act. ch. 85-55, 1985 Fla. Sess. Law Serv, 251 (codefied as amended at FLA. STAT. ANN. § 380.06 (15)(d) (West Supp. 1986)).

53. *See generally* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS (R. Levitt & J. Kirlin eds. 1985).

54. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

55. Arceneax v. Treen, 671 F.2d 128, 137 (5th Cir. 1982) (Goldberg, J., dissenting).

56. 427 U.S. 297 (1976).

57. A suspicious observer would undoubtedly suggest that the cut-off period had been set at six years because the politically influential vender had been in business for seven years. The record, however, contains no evidence on this point.

58. 427 U.S. at 303-04 (citations omitted).

59. U.S. CONST. amend. V.